FILE COPY

No. 860

In the Supreme Court of the United States

OCTOBER TERM, 1960

ERNEST MARK HIGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinions in the court of appeals below are not yet reported (Pet. App. B, pp. 20-30).

JURISDICTION

The judgment of the court of appeals was entered March 2, 1961. The petition for a writ of certiorari was filed on March 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in refusing to grant leave to withdraw a plea of guilty.

RULE INVOLVED

Rule 32(d), F.R. Crim. P.:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioner was indicted in the District Court for the District of Columbia for violating 2 U.S.C. 192 in that, on May 22, 1958, he had unlawfully failed to appear before a United States Senate Committee in Washington, D. C., to give testimony (count one) and to produce records (count two), as directed by a subpoena served upon him in New York City (J. A. 1-2).[1] On October 30, 1959, petitioner, with his retained counsel Margaret Wallach, pleaded not guilty (J. A. 2, 3). On February 26, 1960, petitioner appearing through Mr. Madden, also retained counsel, requested that his plea of not guilty be withdrawn and that a plea of guilty to count one of the indictment be entered, the government having agreed to

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

dismiss count two at the time of sentence (J. A. 4). The following colloquy ensued (Pet. App. B, pp. 21-22):

> The Court: You are charged in count one, the grand jury saying the defendant having been duly summoned as aforesaid did, in the District of Columbia, on the said May 22, 1958, unlawfully fail and refuse so to appear and give testimony and thereby willfully did make default.
>
> Do you understand that charge?
>
> The Defendant: I do, Your Honor.
>
> The Court: Well, did you do that?
>
> The Defendant: Yes, sir, I did.
>
> The Court: And you wish to plead guilty to that charge?
>
> The Defendant: Yes, sir.
>
> The Court: And you do that freely and voluntarily?
>
> The Defendant: I do, sir.
>
> The Court: Without any compulsion or threat or promise or anything?
>
> The Defendant: Yes, sir.
>
> The Court: Do you understand fully the consequences of such a plea?
>
> The Defendant: I do, sir.
>
> The Court: You haven't been made any promise or threat of any kind?
>
> The Defendant: None whatever.
>
> The Court: And you make the plea solely because you are guilty?
>
> The Defendant: I do, sir.
>
> The Court: You are satisfied with the advice and representation of your counsel?
>
> The Defendant: I am, sir.
>
> The Court: Take his plea, Mr. Clerk.
>
> The Deputy Clerk: Yes, sir.

The Court: To count one.

The Deputy Clerk: Ernest Mark High, in Criminal case No. 949-59, in which you are charged with contempt of the House of Representatives,[2] refusal to testify, you wish to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to count one of the indictment?

The Defendant: I do.

Sometime thereafter, but prior to sentencing, petitioner made representations that imprisonment would jeopardize his life. As a result, the sentencing judge entered an order hospitalizing the petitioner for purposes of determining his actual physical condition (J. A. 5). Upon receipt of the hospital report, the judge, on June 3, 1960, called a pre-sentencing morning conference in his chambers. No reporter was present.[3] During that meeting, at which petitioner was not present, the judge informed petitioner's counsel, Mr. Madden, that, based on the negative showing of the hospital reports, he intended to sentence the petitioner to five months in prison (J. A. 31). Mr. Madden then went to the hospital and revealed to the petitioner the judge's intentions (J. A. 32). The petitioner requested that his counsel make a motion to withdraw his plea of guilty (J. A. 32).

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[2] Actually, the petitioner was in contempt of the Senate (J. A. 1).

[3] What transpired at this meeting was revealed in a hearing called to determine petitioner's subsequent motions to vacate sentence and to withdraw the plea of guilty (J. A. 13-47).

Mr. Madden spoke with the judge that afternoon about withdrawing the plea. At a hearing on a motion after sentence to withdraw the plea, Mr. Madden testified that, although his request was not formal and not in writing, he regarded his conversation as a request for permission to withdraw the plea, which was opposed by government counsel and denied by the judge (J. A. 35-36).[4]

The judge stated that he did not consider the request a motion (J. A. 29-30). There was agreement that the request was made and that Mr. Madden based the request on the claim that, as a result of the medical report, there were witnesses who could offer a defense (J.A. 29, 33-34, 29). During the conference, the judge noted that petitioner had been asked to submit to examination before the case arose and indicated that he did not think a motion to withdraw would be proper (J. A. 14, 29-30). Mr. Madden testified that he did not think the "motion" would have been made had it not been clear that petitioner was facing a jail sentence (J. A. 32). Mr. Madden had had petitioner examined by a Washington physician before the plea of guilty was entered (J. A. 39).

That afternoon, the petitioner was sentenced to a term of imprisonment for five months and ordered to pay a fine of $500.00 (J. A. 6, 7). No motion to vacate the plea was made in court at the time of sentencing.

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[4] The United States Attorney was not present at the beginning of the discussion but was sent for by the judge (J. A. 30-31).

On June 10, 1960, the petitioner, having retained new counsel, filed a written motion to vacate sentence and for leave to withdraw the plea of guilty (J.A. 7-8). On June 24, 1960, a hearing was held on the motion, at which time the facts as to the pre-sentence conferences were developed.[5] The court expressed concern about the allegation, first made the morning of the hearing, that petitioner was not guilty of the offense (J.A. 40). The claim was that the subpoena had expired and a telegram sent to petitioner ordering him to appear did not revive the subpoena (J.A. 40-41). The government showed that a subpoena was issued on May 13, 1958, ordering the petitioner to appear in Washington (J. A. 44). An accompanying letter gave the petitioner an option to appear in New York City (J. A. 46). Petitioner failed to make any such arrangements and a telegram was sent ordering him to appear in Washington, D. C., on May 22, 1958, pursuant to the subpoena of May 13th, which had been extended to cover this period (J. A. 46-47). Petitioner requested a continuance for two weeks, but the request was rejected (J. A. 47). He did not appear on May 22. In the light of these facts, the court considered the alleged defense unmeritorious (J.A. 47) and denied the motion to withdraw the plea. The court of appeals affirmed the order of the district

[5] Testimony at the hearing was given by Edward W. Garrett, Chief Probation Officer who was present at the pre-sentencing conferences (J. A. 15-30) and Murdaugh S. Madden, petitioner's counsel during the pleading and sentencing proceedings (J. A. 30-39). Affidavits of the petitioner and Madden were also submitted (J. A. 9-11, 11-12).

court (Pet. App. B, pp. 20-28), Judge Edgerton dissenting (Pet. App. B, pp. 28-30).

ARGUMENT

Rule 32(d) of the Federal Rules of Criminal Procedure provides that a motion for withdrawal of a guilty plea "may be made only before sentence is imposed," but that, "to correct manifest injustice," the court may allow the plea to be withdrawn after sentence. It is not seriously contended that petitioner made a showing which would have warranted withdrawal of the plea after sentence, had there been no request for withdrawal of the plea before sentence.[6] The gist of petitioner's argument, in reliance on the dissent below, is that the case should be treated as if the motion to withdraw the plea had been made before sentencing, and that the motion should have been granted on the basis of the allegations then made. On that basis, we think that the ruling of the court below was correct and presents no issue warranting review by this Court.

1. Rule 32(d) gives no absolute right to withdraw a plea of guilty even before sentence. The granting of such a motion rests in the discretion of the district

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[6] Petitioner now claims (Pet. 17) that there was no valid plea at all since the Clerk asked petitioner whether he pleaded guilty to contempt of the House of Representatives, rather than the Senate (see the Statement, *supra*, p. 1). This slip of the tongue, which went unnoticed by all parties, did not serve to invalidate the plea. Petitioner and his counsel clearly knew that petitioner was pleading guilty to the offense charged in count one of the indictment.

court, and, before withdrawal is permitted, there must be some real showing that the plea was involuntarily or improvidently entered. *Vasquez* v. *United States*, 279 F.2d 34 (C. A. 9); *United States* v. *Panebianco*, 208 F.2d 238 (C. A. 2), certiorari denied, 347 U.S. 913; *Williams* v. *United States*, 192 F.2d 39 (C.A. 5). The record conclusively shows, and petitioner does not claim otherwise, that petitioner's plea of guilty was knowingly and competently made with the advice of experienced counsel. The record also makes it quite clear that the real and the only reason for the request to withdraw the plea before sentence was the fact that the judge had indicated that he thought petitioner's conduct warranted a jail sentence and that he did not find petitioner's physical condition such as to justify failure to impose one. Although Mr. Madden had had a copy of the medical reports before the morning conference (J. A. 38), he admitted that he did not make a request for withdrawal of the plea at that time (J. A. 36, 39). The claim of a defense based on the medical report was apparently only that incarceration would jeopardize petitioner's life (J.A. 32, 34). In connection with this representation, petitioner's counsel also indicated that doctors had become available in Washington whereas certain doctors in New York, who were somehow involved in the case could not be contacted (J.A. 34). The exact relevance of these facts are difficult to understand, and apparently were preserved as an unconvincing attempt to give a colorable reason for the attempt to change the plea. Mr. Madden admitted at the hearing on the motion to vacate that he had petitioner examined by

a physician in Washington before the plea of guilty was entered (R. 39). It is significant, also, that, at the hearing on the motion to vacate the plea of guilty after sentence, counsel did not undertake to support the existence of a medical defense, but instead relied upon a claim of expiration of the subpoena—a claim which the judge properly found not to be of substance (see the Statement, *supra*, p. 6). Under these circumstances, even if Mr. Madden's conversation with the judge had been regarded as a motion for leave to withdraw the plea, its denial would not have been an abuse of discretion. As stated in *Friedman* v. *United States*, 200 F.2d 690, 696 (C.A. 8), certiorari denied, 345 U.S. 926:

> It is not a ground for reversal of a trial court's order refusing leave to withdraw a plea of guilty that the defendant did not know, when he entered his plea, that he would or might be subjected to a more severe sentence than he anticipated. * * *

See also *Williams* v. *United States*, 192 F.2d 39, 40 (C. A. 5); *United States* v. *Shneer*, 194 F.2d 598, 600 (C. A. 3).

2. The authorities cited by petitioner (Pet. 10-11) are inapposite. In *Dandridge* v. *United States*, 356 U.S. 259, the government confessed error because the petitioner may have been suffering from a disabling illness which prevented him from making a knowing and intelligent waiver of his right to trial. In *Carter* v. *United States*, 350 U.S. 928, the government confessed error because, on its face, petitioner's plea did not show an unqualified admission of guilt. In *Gearhart* v. *United States*, 272 F.2d 499 (C. A. D. C.), a

withdrawal of the plea of guilty was allowed on the grounds that evidence of previous psychiatric disorders substantiated petitioner's claim that he was mentally incompetent at the time of the commission of the crime. In *Poole* v. *United States*, 250 F.2d 396 (C. A. D. C.), the plea was allowed to be withdrawn because it had been entered by the petitioner without the aid and assistance of counsel. In *Kercheval* v. *United States*, 274 U.S. 220, a post-sentence motion to vacate the plea was allowed because the prosecutor had promised a lenient sentence. No equivalent aggravated circumstances exist in the present case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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